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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 640

SAM FRIEDMAN AND SAM PRASKA,
Appellants,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

FRANK HOGAN,
District Attorney, New York County,

RICHARD G. DENZER,
EDWIN C. HOYT, JR.,
Assistant District Attorneys, New York County,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 640

SAM FRIEDMAN AND SAM PRASKA,
Appellants,

against

THE PEOPLE OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

May it Please The Court:

Now come appellees and move that the appeal be dismissed, or in the alternative that the final judgment appealed from be affirmed.

Preliminary Statement

These are appeals pursuant to § 1257 (2) of the Judicial Code [28 U. S. C. A. 1257 (2)] from final judgments of the New York Court of Appeals affirming convictions of appellants in the Court of Special Sessions of the City of New York, New York County, of the crime of Public Traffic On Sunday (New York Penal Law § 2147). The opinion of the Court of Appeals is published at 302 N. Y. 75. This appeal was allowed by Mr. Justice Jackson.

Introduction

Appellants are proprietors of kosher butcher shops in New York City. Both are adherents of the Jewish faith. In the trial court they conceded violations of the law by selling uncooked meat on Sunday and frankly stated their purpose to prepare a test case (Record, fols. 41-8, 176-9, 236-9).[1] On the side of the prosecution, the Hebrew Butcher Workers' Union of Greater New York, AFL, and five kosher butchers' associations appeared as *amici curiae* to state their interest in the preservation of Sunday as a legally enforced day of rest (Record, fols. 43, 49-50, 56-8).

Appellants base their appeal to this Court upon contentions: (1) that Article 192 of the New York Penal Law is a law respecting an establishment of religion and restraining their religious liberty; (2) that it is discriminatory because while requiring butcher shops to be closed on Sunday it allows stores of certain other types to remain open; and (3) that it has been unequally enforced.

The Statute

Article 192 of the New York Penal Law (§§ 2140-2154) constitutes a comprehensive legislative scheme, setting apart Sunday as a day of rest from labor while permitting the continuance of certain activities necessary to the public safety, convenience or recreation.

Section 2147, the one particularly here involved, deals with public traffic on Sunday. It prohibits "All manner of public selling or offering for sale of any property" except certain foods, alcoholic beverages, tobacco, ice, sodawater, flowers, souvenirs, newspapers, gasoline, oil, tires, drugs,

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[1] Folio references are to the printed record in the Court of Appeals.

medicines and surgical instruments. It also specifically states:

> "The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day."

Point I

No Substantial Question Is Presented

A. *Article 192 is a valid health measure and does not impair religious liberty*

Although the observance of Sunday as a day of rest is, along with many of our customs, of religious origin, it now exists as a civil institution serving the public need for a general day of rest and recreation without interference from commercial activity. [*Hennington* v. *Georgia*, 163 U. S. 299, 304-307; *Petit* v. *Minnesota*, 177 U. S. 164, 165; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710; *People* v. *Havnor*, *supra*, 149 N. Y. 195, 202-204; *Lindenmuller* v. *People* (N. Y. Gen. T. 1861) 33 Barb. 548, 568; *Commonwealth* v. *Has* (1877) 122 Mass. 40, 42].

The choice of the day of rest being within the discretion of the legislature, it was entirely natural that it should choose the one which was already by custom treated as a holiday by the greatest number of citizens [*Hennington* v. *Georgia*, *supra*, 163 U. S. 299, 304, 306-307; *People* v. *Havnor*, *supra*, 149 N. Y. 195, 203; *Lindenmuller* v. *People*, *supra*, 33 Barb. 548, 569].

B. *There was no Showing of Purposeful Discrimination*

The exemptions contained in the Sunday law, in favor of certain activities considered to be necessary to the public safety, comfort and convenience, and appropriate to the

observance of Sunday as a day of relaxation and recreation, are reasonable, and their determination is properly the function of the legislature [*Petit* v. *Minnesota*, 177 U. S. 164; *People* v. *Dunford*, *supra*, 207 N. Y. 17, 20; *People* v. *Havnor*, *supra*, 149 N. Y. 195, 205]. The fact that the legislature has made explicit its intent that the sale of uncooked meat be not considered one of these appropriate activities does not constitute discrimination (*cf. Petit* v. *Minnesota*, 177 U. S. 164, 165-166).

Appellants' questionable contention that broadcasting companies, sports arenas and amusement enterprises have violated other sections of the law than the one here in issue (Statement of Jurisdiction, pp. 4, 12) has no place in the present discussion. The offer of proof that cigar and drug stores, properly open for the sale of permitted commodities, in some instances sold other commodities without incurring prosecution for violation of § 2147 was properly rejected as irrelevant [Record, fols. 148-51, 202-6; *cf. Snowden* v. *Hughes*, 321 U. S. 1, 8; *Thompson* v. *Spear* (C. C. A. 5th 1937) 91 Fed. (2d) 430, 433-434, cert. den. 302 U. S. 762; *Boynton* v. *Fox West Coast Theatres Corporation* (C. C. A. 10th 1932) 60 Fed. (2d) 851, 854; *Buxbom* v. *City of Riverside* (D. C. Cal. 1939) 29 Fed. Supp. 3, 8; *People* v. *Oreck* (1946) 74 Cal. App. (2d) 215, 168 Pac. (2d) 186, 190-191; *State* v. *Sage Stores Co.* (1943) 157 Kan. 404, 141 Pac. (2d) 655, 662, rehearing den. 157 Kan. 622, 143 Pac. (2d) 652, aff'd 323 U. S. 32].

As was observed by Mr. Justice Frankfurter, concurring, in *Snowden* v. *Hughes*, 321 U. S. 1, 15:

> "The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the courts or the executive agencies of a state. * * * in order to give rise to a constitutional grievance a departure from a norm must be rooted in

design and not derived merely from error or fallible judgment."

Conclusion

Appellants' contentions are insubstantial and foreclosed by previous decisions of the Court. The appeal should therefore be dismissed, or in the alternative the judgments appealed from should be affirmed.

Respectfully submitted,

FRANK S. HOGAN,
District Attorney,
New York County.

RICHARD G. DENZER,
EDWIN C. HOYT, JR.,
Assistant District Attorneys,
Of Counsel.

MARCH, 1951.